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In the Supreme Court

of the United States

OCTOBER TERM, 1933

ELIAS A. OLSON, PETITIONER

vs.

UNITED STATES OF AMERICA

RANDOR G. KARLSON, PETITIONER

vs.

UNITED STATES OF AMERICA

HARRY BREWSTER, PETITIONER

vs.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners' Reply Brief

IN SUPPORT OF PETITION

Government's Brief In Opposition, largely, is a discussion on the merits of the questions involved in the litigation. Petitioners have not attempted to discuss the merits of these

issues. It is not appropriate to do so at this time; accordingly, this Reply Brief will be directed to so much of Government's Brief as bears on the importance of the questions presented in the record, and the necessity of a final determination of these questions on certiorari.

QUESTIONS PRESENTED

The Solicitor General's statement of the questions presented is inadequate. He states (Gov't. Br. p. 3):

> "The question presented therefore is essentially this: Was testimony of *potential utility* of petitioners' tracts of land to water power development, admissible as evidence of its value under the circumstances of this case?"

"*Potential utility* . . . to water power development" is only one of the elements. *Actual use* for water power development is even more to be considered. The Solicitor General's entire treatment of the questions involved practically ignores the fact that Petitioners' lands have been *actually used* for power purposes intermittently for thirty years.

Neither the trial court nor the Circuit Court of Appeals based its judgment exclusively on "*potential utility*." The Circuit Court of Appeals said:

> "The issue is whether *the use* of these properties for flowage purposes is such a use as . . . can be considered . . . " (R. 419).

FOOT NOTE—(Italics ours unless otherwise indicated.)

> "Appellants press strongly the fact that *this use* at the time of and for years prior to the taking in this condemnation *was an actual existing use. That is true* . . . is it logically to be regarded as a use which would influence market value of these lands?" (R. 426).

The Circuit Court of Appeals' decision of the main question, as stated, involves and is based upon the five questions stated in the petition, all of which are squarely presented to this court for final determination.

STATEMENT.

1. The Solicitor General's statement discloses that he has misunderstood petitioners' reason for offering to prove the *actual use* and peculiar adaptability of their land for storage and power purposes. He states (p. 6):

> "This testimony was proffered (R. 162) upon the theory that compensation should be made on the basis of 'reservoir values' of the shore lands."

It was petitioners' theory that the jury in awarding just compensation should consider

> "all of the uses for which respondents' said lands and property are suitable and to which you find from the evidence that his property was adapted on May 4, 1929, and determine which of said uses is the most valuable and base your award thereon." (Respondents' Request No. 2 for instructions to Jury, R. 125-6.)

It was Petitioners' theory that all uses, whether actual, or potential, should be considered, provided they are such as actually did, or probably would, influence market value.

It is important in this connection to correct the Solicitor General's misstatement of petitioners' offers to prove actual and potential use and their theory underlying such offers, for if the offers of proof were made on the theory stated by the Solicitor General, it might well be that the evidence would not be admissible, and as stated on page 3, Government's Brief,

> "If the evidence was rightly excluded no complaint could be made with reference to the charge."

2. The matters urged by the Solicitor General on pages 6, 7, Government's Brief, as well as the counterbalancing facts recited in the Petition pages 5-8, simply present issues of fact for the consideration of a jury and for the later consideration of the court in determining the merits of the questions presented. We refrain from discussing the merits.

3. The Government's contention that it had a right to flood lands in aid of navigation (Gov't. Brief p. 7) has been overruled in *U. S. v. Wheeler Township*, 66 *Fed.* (2d) 977, July 20, 1933.

4. At page 8 of its brief, the Government asserts that

> "The sole ground relied on by the court was that the possibility of assembling the numerous tracts requisite for use of the shores as parts of a reservoir was too remote and speculative to have any legitimate effect upon values . . ."

This statement is inaccurate for it ignores entirely that portion of the opinion which excludes all evidence of the *actual and existing use* of petitioners' lands for power and storage purposes, prior to and at the time of the commencement of these proceedings.

GOVERNMENT'S CRITICISM OF ESTABLISHED FACTS

1. At pages 9-11 of its brief, the Government attacks petitioners' statement of established facts, claiming that "it is not correct to say that the lands have been used for power storage during the past thirty years." This claim is based upon the assertion that the Canadian Government assumed control of the Norman Dam "for the express 'purpose of improving the navigation of said lake (of the Woods)'."

This is misleading. Under the agreement referred to by the Government (R. 237), a then existing *power dam* was to be *improved*. True, navigation was to be aided thereby, but there is nothing to indicate that the use of the dam for power purposes was abandoned. The statement that

> "it was not until 1926 (a year after the treaty permitting fluctuation of levels) that the Norman Dam was used for power purposes." (Gov't. Brief, pp. 9-10)

has no support in fact. The record is to the contrary. (R. 22-24.) The reservoir is primarily used for *power*, fishing and navigation. Government's Exhibit No. 64, (R. 236-238) contradicts the statement contained in Government's Brief. The very first duty of the Lake of the Woods Control Board as specified in Government's Exhibit 64 is

> "to see that all works and all *power canals* in the outlet from the lake . . . shall be so operated as to maintain the level of the lake as nearly as may be between 1056 and 1061 . . ."

It provides that the Board shall

> cause the works to be so operated as to furnish the largest dependable flow of water from the lake to secure navigation in the Winipeg River. *and to the advantage*

of the water powers of the Winipeg River . . . and other interests both on the lake and in the Winipeg River." (R. 238).

This Order in Council, Government's Exhibit 64, is dated January 21, 1919, seven years before 1926, the date on which the learned Solicitor General states the Norman Dam was first "used for power purposes". (Gov't Brief pp. 9-10.)

2. The suggested corrections, numbered "2" and "3" (Gov'ts. Brief, p. 10) have no justification in fact, but they are unimportant on the question now before the Court. Therefore we will not discuss them at this time.

3. Government's suggestions numbered "4" and "5" (Gov't. Brief, p. 11 and 12) and Government's "Argument" (Gov't. Brief, pp. 12-14) likewise arise out of an apparent misapprehension by the Government of the facts in the record. A comprehensive statement of these facts would not be appropriate here. They have no proper place in the question now before the Court. They deal with the merits of the questions in litigation.

However, the *fact* remains, and it can not be successfully contradicted, that there was competition for ownership and control of the shorelands and reservoir, and that market value was increased because of the actual use and adaptability of these shore lands for reservoir purposes. Whether or not this *competition*, and this *actual use and adaptability*, with their consequent *increase in market value* may be taken into consideration in awarding just compensation may not be argued now, for it goes to the very question which was decided by the Circuit Court of Appeals and which petitioners seek to have this Court review on certiorari.

CONSIDERATION OF GOVERNMENT'S "RESPONSE TO PETITIONERS' POINTS"

I.

A. CONSTRUCTION OF THE TREATY OF 1909 IS ESSENTIAL TO A DECISION HEREIN.

The Government asserts that the Treaty of 1909 is not involved and that it has not been construed by the Circuit Court of Appeals, and requires no construction by this Court. To sustain this contention reference is made to that part of Article II which provides that

> "this provision shall not apply to cases already existing . . ."

Thereupon, the *Government construes the treaty* as not applying to these proceedings by claiming that they are "cases already existing" within the meaning of the treaty.

The fallacy in Government's reasoning and position is obvious. To sustain its contention that the construction of the treaty is not involved and is not before this Court, the Government finds it necessary to *construe the treaty*, thereby proving that the Treaty of 1909 is involved. Government in its Brief may not construe the treaty and thereby remove it from final construction by this Court. Especially is this true since the construction placed upon the treaty by the Government is not the only possible construction and appears not to be the construction placed upon it in the dissenting opinion.

The phrase "cases already existing" is not to be brushed aside with a gesture as Government's Brief attempts to do. It regulates matters of importance to this country and to Canada.

The Treaty of 1909 applies generally to the entire boundary waters. Does the phrase mean cases pending in court? Does it mean cases lawfully existing? Is its application limited to cases of damage caused by diversion of water up to, but not after, the consummation of the treaty? Or does it include damage caused subsequent to the treaty? These questions must be answered and the treaty construed before it can be said that the Treaty of 1909 is not involved herein.

It is reasonable to construe the phrase "cases already existing" as applying to occasions or periods when there was "interference with" the boundary waters "*resulting in injury on the other side of the boundary.*" It is only such occasional interference that

> "shall give rise to the same rights and entitle the injured parties to . . . . legal remedies." (Art. II, Treaty of 1909, Appendix A, p. 29).

It is significant that from 1898 to 1909 inclusive there were five separate periods of time when the lake level was below 1059 sea level datum (R. 213, Gov't. Ex. 25). The ordinary high water mark to which the Government had a right to maintain the lake level was 1059. (R. 128-129). Accordingly there were no trespasses during these five separate periods of low water. Hence there were no "cases existing" for those periods.

The construction and maintenance of the Norman Dam was not a trespass. It gave rise to no cause for damage. But during the period from 1898 to 1909 inclusive there were a number of periods of high water which caused damage. Each period of high water gave a separate cause for damage. Each period of high water prior to the date of the Treaty of 1909

presented a "case already existing." Article II of the Treaty expressly provided that these "cases already existing" should not be affected by the treaty. It was the evident intention of the High Contracting Parties that the Treaty of 1909 should not "apply to cases already existing" and growing out of the periodic flooding of American lands. In other words the Treaty of 1909 was not intended to affect past claims. It was intended to establish future "rights" and obligations.

It is significant that the word "cases" was used in the Treaty, rather than conditions, or diversions, or interference, or some similar term. It is fair to infer that if a condition such as created by the Norman Dam on the Lake of the Woods were intended to be excluded from the future application of the treaty, it would have been easy to express it in appropriate and unambiguous language.

The fact that the dissenting opinion by Circuit Judge Booth makes no mention of the provision with reference to "cases already existing," and that Judge Booth uses the word *trespasses*, in the plural, (R. 430-431) indicates that Judge Booth was of the opinion that the Treaty of 1909 applies to the Lake of the Woods, that there were a number of "trespasses" before 1909, which were the "cases already existing" referred to in Article II of the Treaty.

At any rate, it cannot be doubted that the Treaty of 1909 was construed by the Circuit Court of Appeals, and that such construction was necessary to support its judgment.

B. THE TREATY OF 1909 CONFERS A RIGHT OF REDRESS FOR FLOWAGE.

The Government contends (pp. 16-18. brief) that if

the Treaty of 1909 is applicable to the cases here involved, it gave petitioners no right of redress for flowage. Here again the Government's contention involves a consideration of the merits of these cases. In passing, it may be noted that the Government's argument ignores certain important and controlling treaty provisions. They are as follows:

"ARTICLE IV.

The High Contracting Parties agree that except in cases provided for by special agreement between them, they will permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary *unless* the construction or maintenance thereof is *approved by the aforesaid International Joint Commission.*"

"ARTICLE VIII.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, *as a condition of its approval thereof*, that *suitable and adequate provision*, approved by it, *be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby*,".

The foregoing Articles of the Treaty constitute a contract between the two Nations for the benefit of their respective citizens. To permit the lake level to be raised without "adequate provision . . . . for the protection and indem-

nity . . . ." of petitioners would constitute a "breach of contract" which would entitle petitioners to redress in the Canadian Courts, under authority of the cases cited in Government's Brief, pp. 17-18, and under the theory suggested in the dissenting opinion of Circuit Judge Booth. (R. p. 433, par. 3).

In view of these provisions it is unreasonable to assume that the Treaty of 1909 gave no right of redress to petitioners.

At any rate, the matter was decided by the Circuit Court of Appeals. It is of international importance, and merits final determination by this Court.

C. THE TREATY OF 1909 ESTABLISHES THE COMPETENCY OF EVIDENCE OF RESERVOIR VALUES ATTRIBUTABLE TO EXISTING USES OF PETITIONER'S LANDS FOR A STORAGE RESERVOIR.

At page 18 of its Brief, the Government urges that even though the Treaty of 1909 conferred a right of redress for flowage, evidence of reservoir values "would be inadmissible in an action under the treaty for the reason that they were held inadmissible in this case; valuations based on reservoir utility of land would be speculative and conjectural, because the diversity of titles was such as to make unification out of the question."

This argument is unsound:

(a) Redress under the Treaty is redress for an *actual existing use* which does not involve potential unification of titles. By such actual use titles and property were unified in

fact. All the shore lands in question were actually being used as a unified reservoir. In dealing with redress or compensation for property as it actually is being used, the question of potential unification of titles is moot.

Emmons v. Utilities Power Co.
82 *N. H.* 181,
141 *Atl.* 65.

"A new situation has been created by the taking. *The condemnor has eliminated all uncertainty of effecting the combination of the properties.*"

(b) In the second place, the argument urged by the Government assumes as its premise, the correctness of the majority decision of the Circuit Court of Appeals in these cases. It assumes that petitioners' evidence of actual use and adaptability was properly excluded. That is one of the questions sought to be reviewed by this Court. This process of reasoning assumes the proposition to be proved. It assumes to determine the merits of these cases prior to, and as a basis for, determining whether or not this Court should review them in order to decide the merits.

The statement at top of page 19 of Government's Brief ignores the distinction between "*actual existing use*" and "*potential*" use.

The objection that the use is "remote and speculative" may be urged only against "*potential*" use. It may not be urged against "*actual existing*" use.

The only reason advanced by the majority decision against admitting evidence of "*actual existing*" use is that the Treaty of 1909 gave Petitioners no redress for such use being

made of their land. Petitioners believe that this was an improper construction of the Treaty.

D. INTERNATIONAL RELATIONSHIPS BETWEEN THE UNITED STATES AND CANADA HAVE NOT BEEN SET AT REST BY THE TREATY OF 1925.

At pages 19-20 of its brief, the Government urges that the decision of the Circuit Court of Appeals has no bearing on the relationship between the United States and Canada. Article IX of the Treaty of 1925 is cited as setting "at rest . . . . our relationships with Canada" under the Treaty of 1909. The Treaty of 1925 has no such effect, for the following reasons:

(a) The Treaty of 1909 applies generally to all boundary waters between Canada and the United States. The Lake of the Woods is nowhere mentioned. The Circuit Court of Appeals' decision is a general construction of that general treaty. It determines the rights of American property owners under the Treaty of 1909. The limitation on American rights so imposed by the Circuit Court of Appeals in this decision will hamper American citizens from the State of Maine to the State of Washington, and it will continue so to apply and hamper for all time, until corrected by this Court.

(b) The Treaty of 1925 not only does not "set at rest" the possibility of international differences arising out of the construction by this case, of the Treaty of 1909, but Article X of the Treaty of 1925 expressly provides for Canada's continued interest. Canada must pay 50% of the cost of the flow-

age easement, over and above the $275,000 which she has already paid. (Appendix B, p. 33).

Continuing international relationships are involved in the Circuit Court of Appeals' construction of both these treaties. Matters of such importance should be determined by this Court.

II.

CONFLICT OF DECISIONS

At pages 20-30 of its Brief, the Government attempts to reconcile the majority decision in the instant cases with the cases cited in the Petition and Brief, as conflicting therewith. A reply to Government's Argument would require a discussion, on the merits, of the questions presented for review. Such a discussion is inappropriate at this time.

The cases are before the Court. The conflict pointed out in the Petition and Supporting Brief is basic and fundamental. Government's ingenious attempt at reconciling the decisions can not remove the conflict. The following statements may assist in pointing out the conflict.

Basic Principle Violated.

The basic principle which runs through and supports the decisions cited in the Petition and Supporting Brief, as well as all other well considered decisions is:

Value, resulting from ACTUAL USE, *or from* SPECIAL ADAPTABILITY *for a useful purpose, may be proved and con-*

sidered in determining market value, provided:

(*a*) *That such* ACTUAL USE *existed at the time of, or prior to, condemnation, and independently thereof; or.*

(*b*) *That such* SPECIAL ADAPTABILITY *existed prior to and independently of the condemnation, and that such special adaptability is so considerable that a unification of the properties necessary to the useful purpose is reasonably probable and practicable. Eminent Domain as a means of unification need not be excluded where the other requisites are present.*

(*c*) *That such actual use, or such special adaptability has in fact affected the market value.*

In the instant cases all three requisites are present:

(a) The property has been *in actual use* as a storage reservoir for electric power ever since 1898, long before the condemnation proceedings were begun or thought of, and entirely independently of such proceedings.

(b) The *special adaptability* of the lands for storage reservoir purposes existed and was recognized before the Norman Dam was built in 1898. Otherwise the dam, which was built for electric power would not have been built (R. 24). The then existing special adaptability was entirely independent of these condemnation proceedings, and it was so considerable and conspicuous that both Governments took cognizance thereof. That unification of the properties was both probable and practicable was never questioned. The physical unification of the properties was completed as soon as the reservoir was filled following completion of the Norman Dam in 1898. No one questioned that unification of titles would follow.

The physical unification of the properties completely eliminated the question of unification of titles as an element of uncertainty.

> "A new situation has been created by the taking. The condemnor has eliminated all uncertainty of affecting the combination of the properties."
>
> *Emmons v. Utilities Power Co.*,
> 82 *N. H.* 181,
> 141 *Atl.* 65.

Petitioners offered to prove by the testimony of Mr. Adolph F. Meyer, consulting engineer for the International Joint Commission and hydro-electric engineer for the Keewatin Power Company, the builder of the Norman Dam, that there was substantial and fundamental conflict of interest between the electric power interests operating in the Province of Ontario and the electric power interests operating in the Province of Manitoba; that such conflict caused competition, between the Ontario interests and the Manitoba interests, to develop and control the Lake of the Woods storage reservoir. That the one or the other of said groups of power interests would have acquired flowage easements on Petitioners' lands, and other lands necessary to the formation of said storage reservoir, if the Governments had not co-operated to acquire such easement. That it would have been practicable for private interests to have acquired said flowage easement, and that it would have been accomplished by private enterprise (R. 37-40).

(c) The *actual use* of the land did in fact increase market value. The record is conclusive and uncontradicted on this point.

Likewise, the generally recognized *special adaptability* of these lands for power reservoir was such that market value naturally and probably would be and *actually was* increased thereby.

> "Any rise in value before the taking, not caused by the expectation of that event, is to be allowed. But, we repeat, it must be a rise in what a purchaser might be expected to give."
>
> *New York v. Sage,*
> 239 *U. S.* 57, 71.

Petitioners' Record shows that there was a "rise in value" and that higher prices were actually paid for these lands because of their use and adaptability. Such increase occurred, not only before condemnation but, many years before the Treaty of 1925 (R. 58, 59, 64-66, 68, 69, 71, 72, 94, 100, 105, 106, 169.)

Conclusion on Conflict of Decisions

Wherever the foregoing facts are present, the decisions of this Court hold that evidence of *actual use*, and evidence of *special adaptability* should be received and considered. The well considered decisions of the Circuit Courts of Appeal are to the same effect.

The majority decision of the Circuit Court of Appeals in the instant cases conflicts with the basic principle running through the cases cited:

(a) Because it excluded evidence of the *actual use* of the property.

(b) Because it excluded evidence of the *special adaptability* of the property for a useful purpose.

(c) Because these lands possess inherent value conferred by the fashioning of the Winnipeg River and the Lake of the Woods. Their value is not created by eminent domain. On the contrary, it was *their value*, inherent and widely recognized, that caused the Keewatin Power company to build the Norman Dam, and caused competition for possession and control of the shorelands and reservoir (R. 38-40).

(d) The decisions cited in the Petition and Supporting Brief hold that such value is the property of the owner of the land, and that it may not be taken without just compensation. The *majority decision takes this inherent value from Petitioners and gives it to the Power Companies without payment of just compensation.* In so doing the majority decision is in conflict with the decisions of this Court and of the decisions of the Circuit Courts of Appeal cited by Petitioners.

III.

THE DECISIONS BELOW VIOLATE THE PROVISIONS AND THE SPIRIT OF THE TREATY OF 1925 AND THE ACT OF MAY 22, 1926.

The Government next urges (Gov't. Br. pp. 30-32) that the majority decision of the Circuit Court of Appeals in no way runs counter to the Treaty of 1925 and the executing Act of May 22nd, 1926. It is said that perhaps "congress would be unlikely, in view of the present decision, to award past damages . . . ." This indicates that Government counsel mis-

apprehend the argument of dissenting Judge Booth on this point, found at page 24, Petitioners' Brief. That argument is not concerned with whether or not the instant decision will influence Congress one way or another in awarding past damages. That is immaterial. The argument is concerned with the rulings of the trial Court on the offers to prove the actual market value of shore lands as influenced by an actual existing user for a storage reservoir. This evidence was excluded. The Treaty of 1925 and the enacting statute contemplates such value, for they recognized damages caused by the past user of shore lands as a storage reservoir. Under the rulings of the trial Court excluding the offered evidence, it was "held in effect that as a matter of law there could be no such damages." The Treaty of 1925 and the enacting statute contemplated these damages; the trial Court and the Circuit Court of Appeals refused to recognize them.

IV.

THE INSTANT DECISIONS CONFLICT WITH THE LOCAL LAW OF MINNESOTA.

In response to Petitioners' Point V, the Government urges that the majority decision of the Circuit Court of Appeals does not conflict with the Minnesota decisions cited by Petitioners. This argument ignores entirely certain undisputed facts. The shore lands involved were actually used as storage reservoir at the time these proceedings were commenced. Values actually had increased because of such user. Shore lands not only "*would* ordinarily sell in the market" at this increased value (*Conan v. City of Ely*, 91 Minn. 127, 131; 97 N. W. 737), but in fact they *did* sell at such increased

values. This present increased value existed in fact. It was tangible and in many instances had been realized through sales.

CONCLUSION

Government's Brief In Opposition contains much argument on the merits of the questions presented for ultimate review and determination by this Court. Petitioners have endeavored to refrain from discussing the merits of these questions deeming it inappropriate to do so at this stage of the proceedings.

The questions urged for review involve questions of national and international importance and affect the rights and interests of large numbers of people. That these cases involve much more than the elementary principles suggested in Government's Brief is attested to by the exhaustive and painstaking opinions written by the majority and by the minority members of the Circuit Court of Appeals.

Petitioners urge the granting of Writs of Certiorari in order that the principal questions presented in their petition may be reviewed and finally determined by this Court, and for the reasons urged in their petition and supporting brief.

Respectfully submitted,

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In the Supreme Court

of the United States

OCTOBER TERM

1933

ELIAS A. OLSON, Petitioner

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RANDOR G. KARLSON, Petitioner

vs.

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HARRY BREWSTER, Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the 8th Circuit.

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In re Arbitration between the Mayor of Tynemouth & Duke of Northumberland, The Law Reporter, L. T. R. 89 *N. S., Sept.* 1903 *to Feb.* 1904, *p.* 557 100

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In the Supreme Court

of the United States

OCTOBER TERM

1933

ELIAS A. OLSON, Petitioner

vs.

UNITED STATES OF AMERICA

RANDOR G. KARLSON, Petitioner

vs.

UNITED STATES OF AMERICA

HARRY BREWSTER, Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the 8th Circuit.

Brief for Petitioners

RULINGS AND OPINIONS BELOW

The proceedings assigned as error in the Trial Court, Hon. John B. Sanborn, District Judge, presiding, are:

1. Rulings excluding evidence and offers of proof (R. 25-123),

2. Order denying requests for instructions (R. 125, 126),

3. Instruction to the jury (R. 126, 130).

Exceptions to the charge (R. 132, 133).

The cases are not reported.

The majority opinion of the Circuit Court of Appeals (Stone and Booth, Circuit Judges, and Wyman, District Judge) appears at R. 417-429. The dissenting opinion by Circuit Judge Booth appears at R. 429-439. The opinions are reported in

Olson v. United States
(C. C. A. 8th Cir. 1933)
67 Fed. (2d) 24.

JURISDICTION

The judgments in the Circuit Court of Appeals were entered August 21st, 1933 (R. 439, 440). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 28 U. S. C. A. Section 347 (a), page 359.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether, on the established facts, the special use and adaptability of Petitioners' lands for water storage and hydro-electric power purposes may be taken into consideration in determining the fair market value of such land.

2. Whether, by the Treaty of 1909 between the United States and Great Britain, with respect to Canada, or under general law, the flooding of land in Minnesota bordering the Lake of the Woods, gave rise to rights and remedies for redress on account of such flooding.

3. Whether, on the established facts, the fact that the flowage easement is being acquired by eminent domain would, as a matter of law, exclude from consideration, in determining fair market value, the special adaptability and actual use of said land for reservoir and power purposes.

4. Whether, on the established facts, the exclusion of all evidence of special adaptability and use of said lands for reservoir and power purposes, violated the Fifth Amendment to the Constitution of the United States, and Section 13, Article I, of the Constitution of the State of Minnesota.